No. 7718.

In the United States Circuit Court of Appeals

For the Ninth Circuit. 9

United States of America,

Appellant,

vs.

Oscar S. Lund,

Appellee.

APPELLANT'S BRIEF.

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TOPICAL INDEX.

PAGE

Statement of the Case 3

Statement of Points on Appeal 4

Statement of Facts 5

The court was without jurisdiction to impose any sentence upon the second count 8

TABLE OF AUTHORITIES CITED.

PAGE

Braden v. United States, 270 Fed. 441 9

Brady v. United States, 24 Fed. (2d) 399 9

Cain v. United States, 19 Fed. (2d) 472 8

16 Corpus Juris, 264 9

Elkins v. Commonwealth, 53 S. W. 2nd, at p. 358 7

Goetz v. U. S., 39 Fed. (2d) 903 8

Miller v. United States, 300 Fed. 529 8

Murphy v. United States, 285 Fed. 801 9

Nielsen, ex parte, 131 U. S. 176 8

People v. Painetti, 80 Cal. Dec. 21 8

People v. Stewart, 64 Cal. p. 60 7

United States v. Buckner, 37 Fed. (2d) 378 8

United States v. Weiss, 293 Fed. 992 9

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STATEMENT OF THE CASE.

This is an appeal from a judgment of conviction, the charge being that the defendant violated the provisions of Section 32, Federal Penal Code. The indictment was filed December 13, 1933, in the Southern District of California and contained two counts. In the first count it was charged that the defendant Lund on July 27, 1932, at San Pedro, knowingly, wilfully, unlawfully and feloniously and with intent to defraud one Lawrence Davis and W. H. Davis, falsely assumed and pretended to be an officer and employee of the United States, act-

ing under the authority of the United States, when as the defendant well knew, he was not an agent and employee of the Government of the United States, nor was he acting under the authority of the United States.

The second count charged that on the same date at the same place, the defendant knowingly, wilfully, unlawfully and feloniously demanded and obtained from one Lawrence Davis, merchandise consisting of twenty gallons of intoxicating liquor by pretending to the said Davis that he was an officer and employee of the United States, acting under the authority of the United States; when in truth, and in fact, he well knew that he was not such an officer.

The defendant was convicted upon both counts, and upon the first count was sentenced to two and one-half years imprisonment at McNeil's Island, and upon the second count was placed upon probation for five years.

STATEMENT OF POINTS ON APPEAL.

There are but two points raised on this appeal. The first point is that the court erred in the taking of testimony out of the presence of the jury, and in not recalling the jury to hear this testimony.

The second point is that the court erred in pronouncing judgment upon the second count, for the reason that the offense charged in the second count is a component part of and necessarily included in the offense charged in the first count.

STATEMENT OF FACTS.

It appeared from the evidence [Tr. p. 11] that on the night of July 27, 1932, at San Pedro, two men entered a small house where W. H. Davis and his son, Lawrence Davis, were standing, and where apparently they had a supply of illicit liquor, and exhibiting a badge, and a piece of paper, stated that they had evidence that Lawrence Davis had sold two pints of liquor, and stated that they were going to search the house. [Tr. p. 13.] The demand was made for money by the two men, but apparently a compromise was entered into by the two men taking away twenty gallons of liquor which they found on the premises and no money was paid. At the trial the younger Davis identified the defendant Lund as being one of the two men. W. H. Davis did not so identify him. [Tr. p. 12.] Counsel for the Government claimed he was taken by surprise when the elder Davis failed to identify the defendant Lund, and was allowed to impeach him by showing he had identified Lund as one of the men present on the night in question on previous occasions.

After the jury had retired but before it had reached a verdict, the court asked the witness W. H. Davis to come forward, and stated to the said witness that he, the court, was advised that the witness desired to make

a further statement, the court using the following language:

> "The Court: The court received a communication to the effect that you desired to make some statement. That communication came to us after the evidence had been concluded and the argument had been partially completed. Accordingly, the Court could not permit you to make your statement in the presence of the jury.
>
> If you desire to make a statement at this time, that privilege will be accorded to you."

The witness then proceeded to make a statement in the absence of the jury, which statement appears on pages 19 to 23 of the transcript, and which need not be here again set forth, but the effect of which was to further modify and change previous testimony he had given in the case. The court received this further statement whereupon the counsel who conducted the trial (but who is not the counsel now appearing on appeal), requested the court to grant him a mistrial, which was denied.

The appellant feels that the testimony contained in the statement which the witness Davis gave in court should have been permitted to go to the jury. The witness Davis was still under oath, and in our opinion, was still giving testimony which the jury was entitled to hear. The testimony for the prosecution and that for the defense was in direct conflict.

The defendant Lund took the stand and flatly denied being present in San Pedro at all upon the occasion in question. The evidence was in direct conflict and any competent testimony which might have thrown light upon whether the defendant Lund was actually present or not, should have been permitted to be considered by the jury.

We have found no Federal cases dealing with this situation. There is, however, the case of *Elkins v. Commonwealth,* a Kentucky case, reported in *53 S. W. 2nd, at page 358.* In that case the defendant was convicted of giving away liquor. A prosecution witness testified as to the giving of the liquor by the defendant to him. While the jury was out and deliberating upon a verdict, the defendant talked to two people who told him that the prosecuting witness testified as he did because he had been paid a dollar to do so. Defendant moved to recall the jury in order to put the prosecution witness back on the stand to interrogate him about this matter and, if he denied it, to put the two new witnesses on the stand to impeach his testimony. This was denied and the jury brought in a verdict of guilty and upon appeal the case was set aside because of the fact that the defendant was not permitted to pursue this course.

It is the law in this state that a trial is not concluded until the verdict of the jury is reached. (*People v. Stewart,* 64 Cal. p. 60.) That being the case, there is no escape from the fact that testimony was given in the absence of a jury, and it would seem that this is not a practice to be followed.

The Court Was Without Jurisdiction to Impose Any Sentence Upon the Second Count.

Probably the leading case is that of *ex parte Nielsen,* 131 U. S. 176, a case with which this court is no doubt familiar, which held that where there were two indictments, and the acts charged in the second indictment were included in the acts charged in the first indictment, that there could be a conviction only in the case of one indictment, to the same effect as the case of *Goetz v. U. S.,* 39 Fed. (2d) 903. This was a fifth circuit case.

In *Cain v. United States,* 19 Fed (2d) 472 (C. C. A. 8th), the indictment was in two counts, one charging the unlawful sale of morphine, the other the unlawful sending of morphine through the mail. The evidence showed a sale by the defendant and a delivery by mail. On appeal, the court held that but one offense had been committed and that a delivery is a necessary element of a sale, and that inasmuch as the delivery was necessarily "included in the sale," a sentence on both counts constituted double jeopardy.

In *Miller v. United States,* 300 Fed. 529, 534 (C. C. A. 6th), it was held that on a charge of sale and possession of intoxicating liquor where the only possession was that shown by the act of sale, the offense of possession was necessarily included in and merged in the offense of sale. See also:

People v. Painetti, 80 Cal. Dec. 21;

United States v. Buckner, 37 Fed. (2d) 378;

Brady v. United States, 24 Fed. (2d) 399;
United States v. Weiss, 293 Fed. 992;
Murphy v. United States, 285 Fed. 801;
Braden v. United States, 270 Fed. 441;
16 *Corpus Juris,* 264.

We think it is perfectly clear from the statement of facts previously outlined above, that even if the jury were justified in convicting the defendant under one count, it must be plain that the evidence necessary to establish one count established the other, and it is respectfully urged that for the error of receiving testimony in the absence of the jury, and the error of imposing judgment upon the second count, that this cause should be reversed and a new trial had.

Respectfully submitted,

AMES PETERSON,
Attorney for Appellant.